

BRB No. 00-0826

ANA DUNNAM (widow of)	
Fred Dunnam))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Donald P. Moore (Franke, Rainey & Salloum, P.C.), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Judgment (99-LHC-1998) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant filed a claim for death benefits under the Act, alleging that her husband's fatal lung cancer was causally related to asbestos exposure at employer's shipyard. During the discovery phase of this case, employer learned that after her husband's death claimant entered into third-party settlements with asbestos manufacturers without employer's approval. Employer filed a motion for summary decision with the administrative law judge on the ground that claimant's claim for death benefits is barred under the provisions of Section 33(g) of the Act, 33 U.S.C. §933(g). Claimant opposed the motion, alleging that the administrative law judge must make findings regarding the amount of the third-party recoveries in relation to the amount claimant would be entitled to receive under the Act.

The administrative law judge granted employer's motion for summary decision. He rejected claimant's contention that there are factual issues in dispute. Specifically, he stated that he need not determine if the third-party settlements are for an amount greater than claimant's compensation entitlement, as Section 33(g) bars the claim if the third-party recoveries are less than the compensation entitlement, and Section 33(f), 33 U.S.C. §933(f), extinguishes employer's liability for compensation if the third-party recoveries are greater than claimant's compensation entitlement. Based on this rationale, and the fact that claimant was a "person entitled to compensation" at the time she admittedly entered into the third-party settlements without employer's approval, the administrative law judge dismissed claimant's claim for death benefits under the Act.

Claimant appeals, contending that the administrative law judge must determine whether the gross amount of the third-party settlement recoveries exceeds claimant's entitlement to death benefits under the Act prior to finding that Section 33(g) bars claimant's claim. In addition, claimant contends that the administrative law judge erred in finding that the offset provisions of Section 33(f) "extinguish" employer's liability for benefits in the event that the settlement proceeds exceed claimant's compensation entitlement. Employer responds, urging affirmance of the grant of summary decision.

Any party may move for summary decision, at least twenty days before the hearing. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1, 3-4 (1990); 29 C.F.R. §§18.40, 18.41. To defeat a motion for summary judgment, the party opposing the motion must establish the existence of a genuine issue of material fact, which is defined as a fact which affects the outcome of the litigation. See *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); *Hall*, 24 BRBS at 4. In determining the propriety of a summary decision, the administrative law judge must draw all reasonable inferences in favor of the party opposing the motion. See *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Dunn*, 33 BRBS at 207. Where a genuine question of material fact is raised, the administrative law judge must hold an evidentiary hearing. See 29 C.F.R. §18.41(b); 20 C.F.R. §§702.331-350. For the reasons that follow, we hold that

claimant established the existence of genuine issue of material fact; thus, we vacate the administrative law judge's grant of summary decision, and remand this case for a hearing as there are genuine questions of material fact to be determined.

Section 33(g) states:

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. §933(g). It is uncontested that claimant entered into third-party settlements after the death of her husband without employer's prior written approval.¹ Inasmuch as claimant was a "person entitled to compensation" at the time she entered into the settlements, see *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S.

¹Inasmuch as no formal hearing was held, no evidence was admitted into the record. The administrative file contains claimant's answers to employer's request for admissions, wherein claimant admits she entered into third-party settlements subsequent to her husband's death without employer's prior written approval. There is no information concerning the amount of the settlements. Claimant was represented by different counsel in the third-party proceedings.

248, 31 BRBS 5(CRT) (1997); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), Section 33(g) will bar her entitlement to death benefits if the gross amount of the third-party settlements exceeds the amount of compensation to which claimant is entitled under the Act. See *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3^d Cir. 1995); *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998) (Smith, J., dissenting); *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5 (1996) (*en banc*) (Brown and McGranery, JJ., dissenting in part). Pursuant to Section 33(f) of the Act, 33 U.S.C. §933(f), employer is entitled to offset against its liability under the Act the net proceeds of claimant's third-party recoveries.

Contrary to the administrative law judge's decision, it is necessary that he make findings of fact in this case. See *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J, concurring in the result). The amount of compensation to which claimant would be entitled under the Act in this death benefits case must be determined with regard to claimant's life expectancy at the time of the hearing and the applicable compensation rate. *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994); 33 U.S.C. §909. This amount is then compared to claimant's aggregate gross third-party recoveries in order to determine if her claim for death benefits is barred by Section 33(g). See *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Bundens*, 46 F.3d 292, 29 BRBS 52(CRT); *Harris*, 30 BRBS 5. If the third-party recoveries are less than claimant's entitlement under the Act, her claim is barred by Section 33(g). See, e.g., *Reynolds v. Todd Pacific Shipyards Corp.*, 122 F.3d 37, 31 BRBS 71(CRT) (9th Cir. 1997). If, however, claimant's third-party recoveries are greater than her compensation entitlement, employer's liability is not necessarily "extinguished" pursuant to Section 33(f). See *Bundens*, 46 F.3d 292, 29 BRBS 52(CRT). Employer's offset under Section 33(f) is only for the *net* amount of the third-party recoveries, 33 U.S.C. §933(f), and moreover, claimant may outlive her life expectancy. Under these circumstances, employer's liability for compensation would resume once the net proceeds are offset. Inasmuch as the administrative law judge did not make findings on material issues of fact, see *Dunn*, 33 BRBS 204; *Gladney*, 30 BRBS 25, we vacate his grant of summary decision in employer's favor. The case is remanded to the administrative law judge for findings of fact consistent with applicable law, and for resolution of any other issues raised by the parties.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision is vacated, and the case is remanded to the administrative law judge for proceedings consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge